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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

GUY A. THOMPSON, Trustee, Missouri Pacific
Railroad Company, Debtor,
Petitioner,

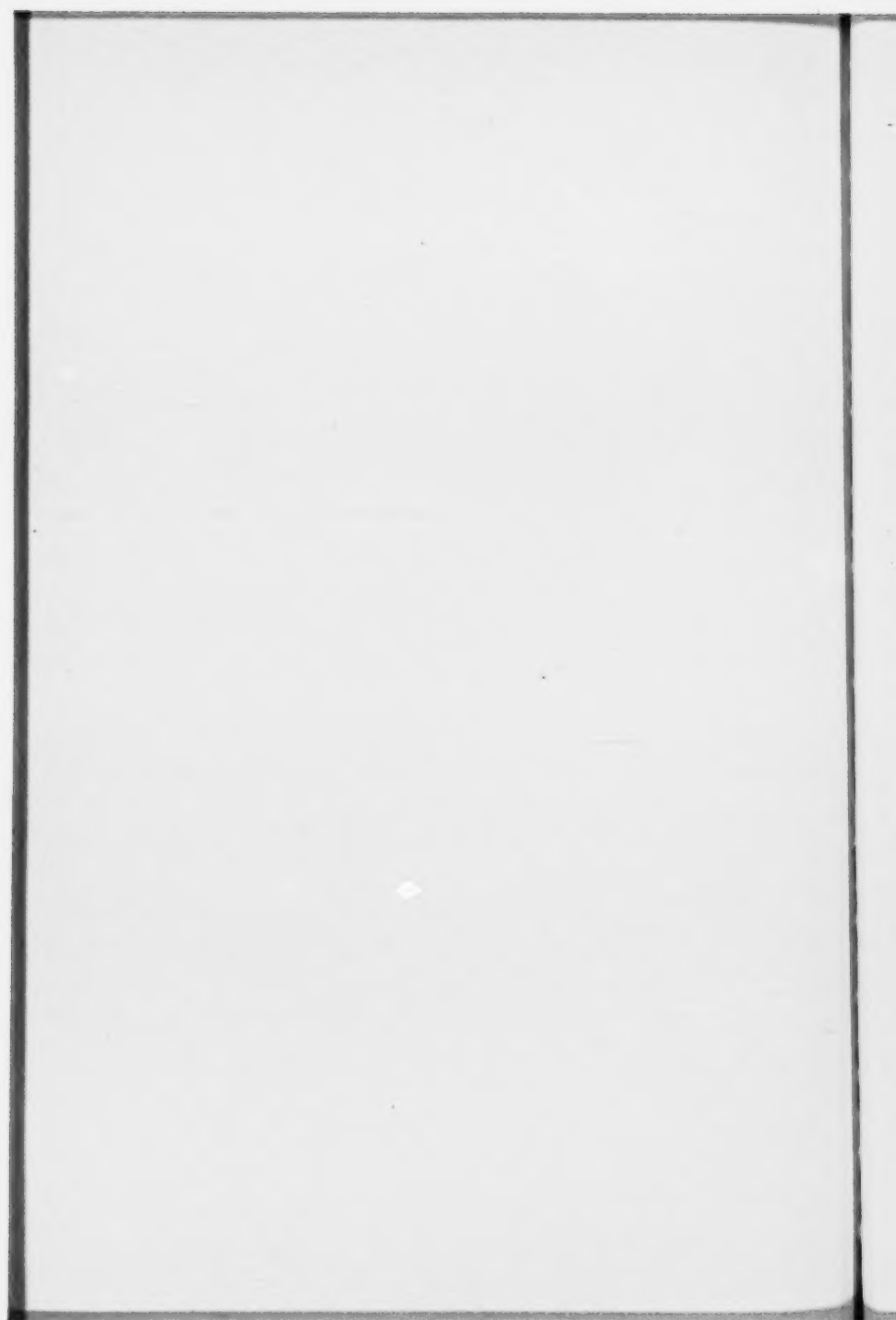
v.

RECONSTRUCTION FINANCE CORPORATION et al.,
Respondents.

(And other cases as shown on page 1.)

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Tenth Circuit.

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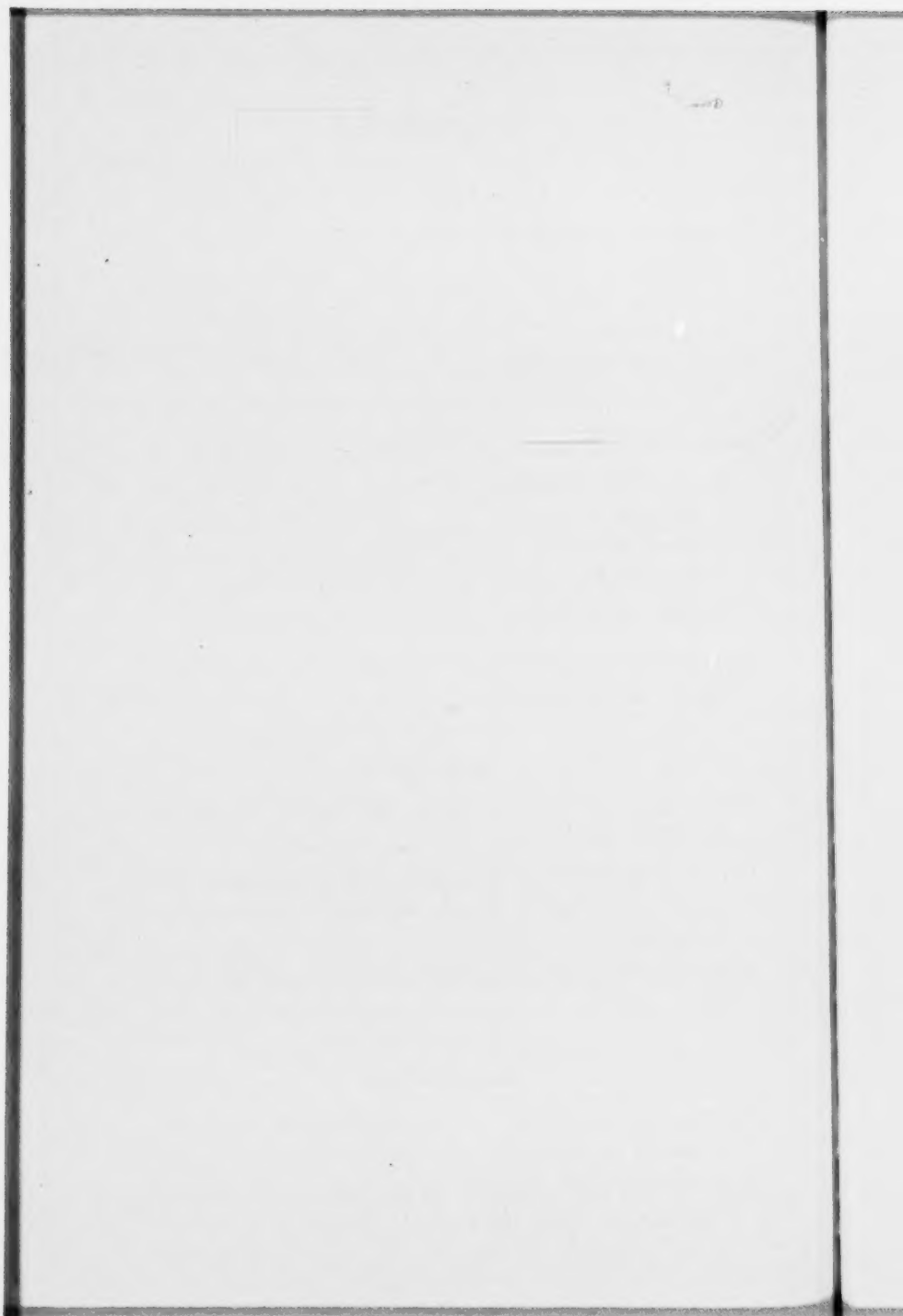
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TITLES OF CASES
In Which This Petition Is Filed.

Guy A. Thompson, Trustee, Missouri Pacific
Railroad Company, Debtor,
Petitioner,

v.

The Denver and Rio Grande Western Railroad
Company et al.,

Respondents.

(Number 2906 below)

Same

v.

The Denver and Salt Lake Western Railroad
Company et al.,

Respondents.

(Number 2907 below)

Same

v.

City Bank Farmers Trust Company, Trustee,
et al.,

Respondents.

(Number 3106 below)

Same

v.

The Denver and Rio Grande Western Railroad
Company et al.,

Respondents.

(Number 3107 below)

Same

v.

Reconstruction Finance Corporation, Insurance Group Committee, Central Hanover Bank and Trust Company, Trustee, United States Trust Company of New York, Trustee, Guaranty Trust Company of New York, Trustee, and The Chase National Bank of the City of New York, Trustee,

Respondents.

(Numbers 2906, 2907,
3106, 3107, 3108 below)

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Tenth Circuit.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, prays that a writ of certiorari issue to review the decrees of the United States Circuit Court of Appeals for the Tenth Circuit, entered May 10, 1945, reversing orders of the District Court for the District of Colorado, approving and confirming a Plan of Reorganization under Section 77 of the Bankruptcy Act for The Denver and Rio Grande Western Railroad Company (the debtor) and The Denver and Salt Lake Western Railroad Company (the subsidiary debtor).

Petitioner holds title to 150,000 (50 per cent) shares of the no par common stock, \$608,800 preferred stock, and \$1,000,000 of Refunding and Improvement Mortgage Bonds of The Denver and Rio Grande Western Railroad Company, by reason of which ownership the interest of petitioner will be materially and adversely affected if the Plan finally be made effective. The Interstate Commerce Commission held that the equities of the owners of the common

and preferred stock of the Debtor had no value, and denied to petitioner the right to participate in any Plan of Reorganization.

The District Court approved the Plan of the Commission. The United States Circuit Court of Appeals for the Tenth Circuit on appeal reversed the District Court, but held that no valuation based on any reasonable estimate of prospective earnings could be sufficiently large to pay the stockholders anything, and approved the finding of the Commission and the District Court that their claims are valueless and barring them from participation in the Plan.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is not yet reported.

The opinion of the District Court (Submission Pamphlet, Page 187) is not reported, except in C. C. H. Bankruptcy Law Service, at Paragraph 54562 and Paragraph 55008.

The reports of the Interstate Commerce Commission (Submission Pamphlet 29, 98, 113 and 151) are reported in 233 I. C. C. 515; 239 I. C. C. 583; 254 I. C. C. 5, and 254 I. C. C. 349.

JURISDICTION.

The decrees of the Circuit Court of Appeals were entered May 10, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Section 347).

QUESTIONS PRESENTED.

1. Whether the Interstate Commerce Commission (hereinafter called the Commission), in arriving at the value of the property of a railroad company undergoing reorganization, may give effect only to past earnings in arriving at the value of the property in question, and disregard

changed conditions, improvements to the property, and all other elements of value.

2. Whether, in determining the prospective earnings of the properties of the Debtor, present earnings may be disregarded and the equities of the stockholders be held to be without value because of diminished earnings during the years of national receding economy and depression.

3. Whether a finding that the equities of the stockholders are of no value can lawfully be made if there is a reasonable probability that earnings will be realized from which substantial dividends can be paid, even though only during periods of economic prosperity.

STATUTE INVOLVED.

The pertinent provisions of Section 77 of the Bankruptcy Act, as amended, 49 Stat. 911, c. 744, 11 U. S. C. A., Sec. 205, are attached hereto as Appendix 1.

STATEMENT.

The petition of the Debtor for reorganization under Section 77 of the Bankruptcy Act, as amended, was filed in the District Court for Colorado on November 1, 1935. After hearings in 1936 and 1937, the Commission approved a Plan of Reorganization which was disapproved by the District Court on March 7, 1941. Further hearing was held by the Commission in May, 1941, which was followed by further evidence taken at the District Court in 1942 and 1943. After hearings, the District Court approved the Plan on October 25, 1943, and after submission to creditors confirmed it on November 29, 1944.

The Debtor appealed from both these orders. The Petitioner appealed from the decree of the District Court entered November 29, 1944, confirming the Plan. All appeals were disposed of by the Circuit Court of Appeals in its Opinion and Decree of May 10, 1945.

REASONS FOR GRANTING THE WRIT.

Question 1.

Subsection (e) of Section 77 of the Bankruptcy Act, as amended, provides, in part, that—

“The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.”

In the cases of **Ecker v. Western Pacific R. Corp.** and **Institutional Investors v. Chicago, M. St. P. & P.*** it was held that in determining whether the equities of stockholders in railroad companies undergoing reorganization had or had not value, the issue involved in such a determination is whether there is a reasonable probability that the earning power of the road will be sufficient to pay prior claims of interest and principal and leave some surplus for the service of the stock; and it was also held that if it be established that there is no reasonable probability of such earning power, then the inclusion of the stock would violate the full priority rule of the **Boyd Case.†**

The question turns, then, on what must be considered in determining the future earnings of the property, because the determination of future earnings settles the value of the property involved in so far as the equities of the stockholders are concerned.

***Ecker et al. v. Western Pacific Railroad Corporation**, 318 U. S. 448; **Group of Institutional Investors et al. v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company**, 318 U. S. 523.

†**Northern Pacific Railroad Company v. Boyd**, 228 U. S. 482.

The statute requires that the value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present and prospective, and all other relevant facts. The Commission had before it the investment of the Debtor and its several corporations in road and equipment (Submission Pamphlet, Page 35), showing, as of December 31, 1935, a grand total of \$238,750,511. When the District Court approved the plan, additions and betterments during the trusteeship had been made to the properties at a cost of approximately \$40,000,000 (Submission Pamphlet, Page 195), and in determining the prospective earning power of the property, the Commission first found, for the combined properties, for the first five years, 1927-1932, available for interest, average earnings of \$8,103,881; a four-year average, 1932-1935, of \$3,606,921; and a three-year average, 1936-1938, of \$1,128,819.

Against this, the earnings of the combined properties available for interest during the following years were:

1942.....	\$17,044,420.39
1943.....	\$11,573,667.93
1944.....	\$10,617,416.48 (for the first 11 months only)

Under the finally approved Plan, fixed interest charges would approximate \$1,694,941; prior contingent interest charges, \$498,318; and contingent interest charges, \$1,364,133. Including the payments to sinking funds and the capital fund, the total to charges before dividends on the preferred stock would be \$4,584,689.

The value of the combined properties for the purposes of the proceeding was found by the Commission (Submission Pamphlet, Page 159) to be approximately \$155,173,127.

It appears that present earnings of the Debtor were given no effect in determining what might be the future earnings of the property, and that the four-year average, 1932-1935,

of \$3,606,921, formed the basis for the final conclusions of the Commission as to what the property could probably earn for the future.

This Court is asked to review this proceeding and determine whether—

Investments of the carrier in road and equipment, additions and betterments, during the period when the carrier is undergoing reorganization, and the present earnings of the carrier, may be given no effect in determining what a railroad property may reasonably be expected to earn for the future.

Question 2.

It is respectfully suggested that this Court should pass upon the question of whether past earnings of a railroad property undergoing reorganization, when such past earnings are brought about because of a national receding economy and depression, should be the determining factor in arriving at a conclusion as to the future earnings of such property.

During the years 1931 to 1939 a general depression occupied the field of industry and many stable corporations were unable, during that period, to earn their fixed charges.

The Plan formulated by the Commission and approved by the District Court proceeds upon the theory that while industry as a whole might entirely recover, railroads, when the present world war is over, will return to earnings available during depression years, and that the value of properties of railroads undergoing reorganization should be determined upon that basis.

Because of the fact that many railroads are now undergoing reorganization, it is regarded as essential that this Court determine what effect is to be given the earnings during these depression years in arriving at a conclusion as to the probable future earnings of such carriers.

Question 3.

Viewed solely from the standpoint of future earnings, it appears that the equities of the stockholders of the Debtor should not be found without value, when it appears that during periods of economic prosperity, the earnings of the Debtor will be sufficient to provide for prior claims and leave a surplus from which substantial amounts can be lawfully paid as dividends.

Subsection (b) of Section 77 of the Bankruptcy Act provides that a plan may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive or to subscribe for securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan.

If we eliminate from consideration the earnings of the property of the Debtor during the depression, and give effect only to earnings prior to such depression and subsequent thereto, it appears that it may not lawfully be found that the equities of the stockholders of the Debtor are entirely without value.

Should the estimated earnings prove to be substantially under the actual earnings, the injustice that will result to the stockholders of the Debtor is obvious.

It seems reasonable, therefore, to request this Court to pass upon the question of whether, in the light of apparent large earnings, the stockholders of the Debtor should be denied any participation in a plan of reorganization. Certainly, a large question is presented—whether such stockholders should not be permitted to have issued to them options or warrants to subscribe for stock in the new company upon such terms and conditions as may be found to be reasonable.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, to review the decrees of the United States Circuit Court of Appeals for the Tenth Circuit, entered on May 10, 1945, reversing orders of the District Court for the District of Colorado, approving and confirming a Plan of Reorganization under Section 77 of the Bankruptcy Act for The Denver and Rio Grande Western Railroad Company, Debtor, and The Denver and Salt Lake Western Railroad Company, Subsidiary Debtor. The decrees of said Circuit Court of Appeals sought to be reversed were entered in cases numbered on its docket, Nos. 2906, 2907, 3106, 3107, 3108, and entitled **In re: The Denver and Rio Grande Western Railroad Company, Debtor.**

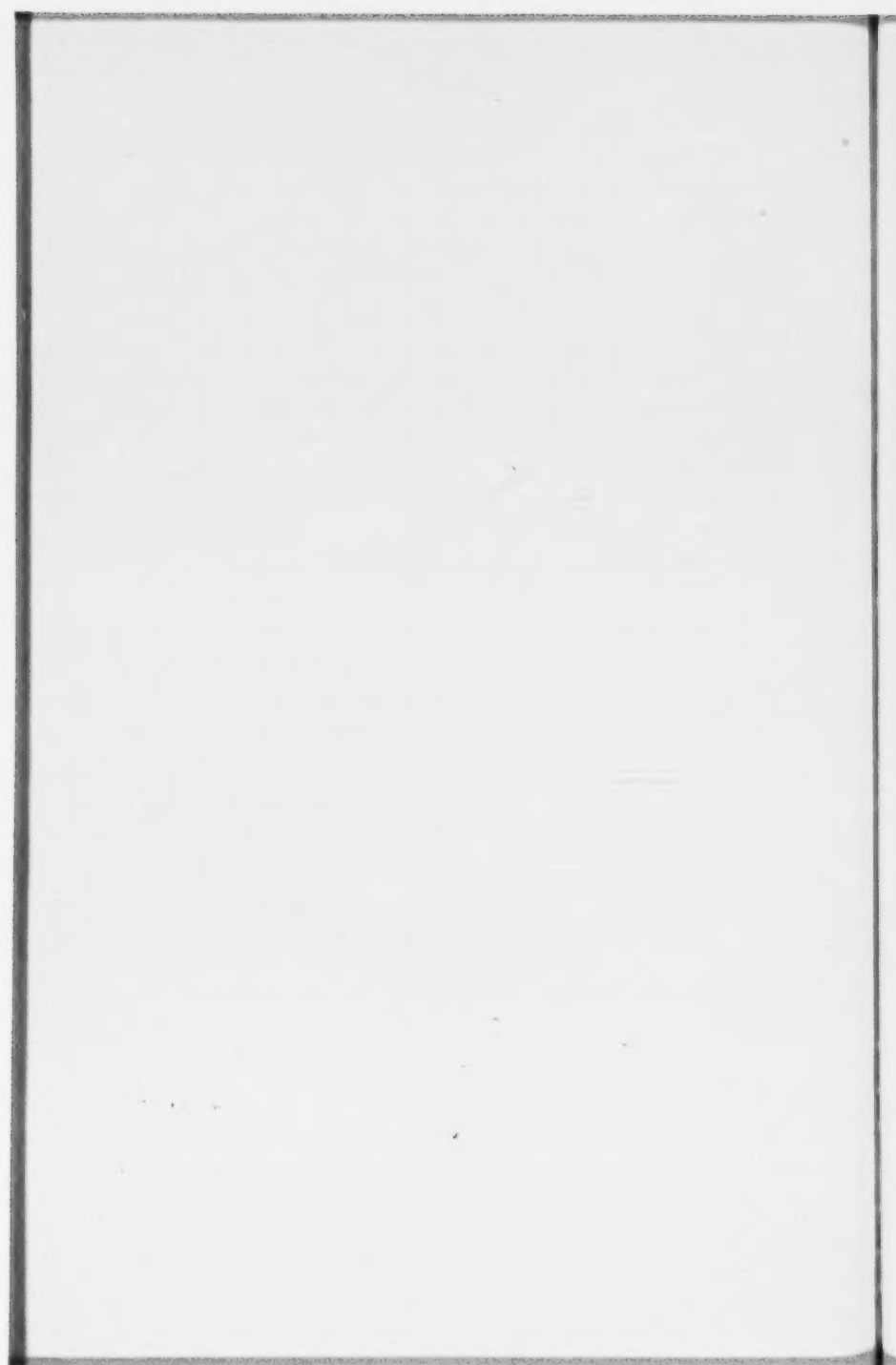
Respectfully submitted,

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Dated August 1, 1945.



APPENDIX.

Excerpts From Section 77 of the Bankruptcy Act As Amended.

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings, experience, and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset

price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such non-adoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 60 of this Act shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of sub-section (p) hereof. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

(c) (10) The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or

are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate.

(c) (11) The Commission may direct such of its agencies as it may designate to file in the proceedings before the Commission a report, and additional or supplemental reports at such time or times as the Commission shall designate, of such data with reference to the property, business, earnings, and corporate organization of the debtor and such other facts as the Commission, after hearing if it deems necessary, shall determine to be necessary or helpful information for the purposes of the preparation of reorganization plans, and for the purpose of aiding in determining the method or formula of allocating earnings permitted by subdivision (10) of this subsection (c). Such report or reports shall be prima facie evidence of the facts therein stated in any proceeding under this section. The actual cost of preparing said report or reports shall be certified by the Commission and shall be borne by the debtor's estate.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such

claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) hereof. If the judge shall approve the plan, he shall file an opinion, stating his con-

clusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: **Provided**, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: **Provided further**, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United

States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the President of the United States or any officer or agency he may designate, is hereby authorized to act in respect of the interest or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: **Provided**, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e). If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons there-

for. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

End

